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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BEN GRAVELLE,

Plaintiff and Respondent,

v.

AQUADEK, INC.,

Defendant and Appellant.

D054215

(Super. Ct. No. GIN058361)

APPEAL from a judgment of the Superior Court of San Diego County, Adrienne A. Orfield, Judge. Appeal dismissed.

Aquadek, Inc. (Aquadek) appeals from a judgment entered against it following a bench trial on Ben Gravelle's suit for breach of contract. As we will explain, we conclude that the notice of appeal was untimely, and accordingly we dismiss the appeal.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

Gravelle filed a complaint against Aquadek, alleging breach of contract arising out of the construction of a swimming pool. After holding a bench trial on January 24 and 28, 2008, the trial court found in favor of Gravelle in the amount of \$15,489.

On May 23, 2008, the trial court entered judgment (the May 23 judgment). The May 23 judgment awarded damages to Gravelle in the amount \$15,489, but indicated zero for the amount of attorney fees and costs to be awarded. On September 25, 2008, the trial court entered an amended judgment (the amended judgment), which was identical to the May 23 judgment, except that it awarded attorney fees to Gravelle in the amount of \$26,240.

On November 26, 2008, Aquadek filed a notice of appeal, purporting to appeal from the amended judgment. In its appellate briefing, Aquadek argues that the trial court erred in finding in favor of Gravelle following the bench trial, but it does not specifically challenge the award of attorney fees.

After the briefing of the appeal was complete, we asked the parties to address whether we lack jurisdiction over Aquadek's appeal on the ground that the appeal was not timely filed.

## II

### DISCUSSION

A notice of appeal from a judgment must be filed on or before the earliest of (1) 60 days after the trial court's mailing of the notice of entry of judgment, (2) 60 days

after a party's service of the notice of entry of judgment, or (3) 180 days after entry of judgment. (Cal. Rules of Court, rule 8.104(a)(1)-(3).)<sup>1</sup>

"The effect of an amended judgment on the appeal time period depends on whether the amendment substantially changes the judgment or, instead, simply corrects a clerical error.'" (*Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222 (*Torres*).) "It is well settled . . . that '[w]here the judgment is modified merely to add costs, attorney fees and interest, the original judgment is not substantially changed and the time to appeal it is therefore not affected.'" (*Ibid.*)

Here, the amended judgment modified the May 23 judgment only to the extent that it added an award of attorney fees, and thus it did not substantially change the May 23 judgment. Accordingly, the time to appeal from the matters set forth in the May 23 judgment is calculated using an entry date of May 23, 2008.

Aquadek filed its notice of appeal on November 26, 2008. Because a notice of appeal must be filed no later than 180 days after entry of judgment (rule 8.104(a)(1)-(3)), and November 26, 2008, is more than 180 days after May 23, 2008, Aquadek's notice of appeal was not timely.

"The failure to file a notice of appeal within the applicable time period deprives the appellate court of jurisdiction." (*Maides v. Ralphs Grocery Co.* (2000) 77 Cal.App.4th 1363, 1366; see also *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 670.) "If a notice of appeal is filed late, the reviewing court must dismiss

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<sup>1</sup> All further rule references are to the California Rules of Court.

the appeal.'" (*Torres, supra*, 154 Cal.App.4th at p. 222 [quoting rule 8.104(b)].)

Accordingly, we hereby dismiss Aquadek's appeal.

DISPOSITION

The appeal is dismissed.

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IRION, J.

WE CONCUR:

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BENKE, Acting P. J.

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O'ROURKE, J.